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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1155

ANTHONY TARTAGLIO, CAROLYN TARTAGLIO, TERESA BASMAJIAN, JAMES BASMAJIAN, JR., STEVEN BASMAJIAN, CHERYL BASMAJIAN, RENEE BASMAJIAN (infants under the age of 14 years),

Petitioners,

vs.

DEPARTMENT OF INSTITUTIONS AND AGENCIES, DIVISION OF PUBLIC WELFARE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF FOR PETITIONERS

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I

RESPONDENT'S ARGUMENT THAT ONLY ACTUAL, VOLUNTARY CONTRIBUTIONS OF THE STEPFATHER WERE USED AS A BASIS FOR CUTTING OFF WELFARE AID HEREIN IS CONTRARY TO THE RECORD AND CONTRARY TO RESPONDENT'S OWN ARGUMENT THAT NEW JERSEY LAW REQUIRES *ALL* INCOME OF A STEPPARENT TO BE INCLUDED

Respondent correctly points out in Part I of its Opposition Brief that the applicable New Jersey Welfare Regulation[1]

[1] N.J. Categorical Assistance Budget Manual, § 706.2(c)(2)(a), quoted on page 4 of respondent's brief.

specifically requires that "the income of ALL members of the family," including "a stepparent," must be included in determining "need" for welfare aid. [Emphasis in original.] Yet respondent argues in Parts II and III of its brief that the Welfare Board in this case failed to do what that same New Jersey regulation required, that is, failed to *assume* the availability of ALL the stepfather's income. Instead (respondent argues), in apparently prescient compliance with an HEW regulation[2] which had not yet been promulgated at the time of the aid cut-off, the Welfare Board made a factual determination of "actual contributions" by the stepfather.

The record of the "fair hearing" itself demonstrates the lack of any factual support for this argument. The Welfare Board's own witness testified (Petition, p. 16) that the above-quoted State Welfare Regulation was "mandatory"; and the "fair hearing" Decision concludes (Petition, p. 17):

> "It is determined that the Atlantic County Welfare Board, in considering the net income of the husband and stepfather, after appropriate adjustment allowances [for job-related expenses], as available for the collective needs of the members of the family budget unit, did correctly apply the provisions of the Budget Manual as quoted above . . . [the same provision quoted herein]"

Respondent offers only two bases for its argument that the Welfare Board failed to follow its own mandatory regulation. First, respondent refers to the stepfather's claim for withholding tax exemptions. But, in accordance with federal tax law, this indicates only that he and his wife jointly claimed to be providing the five stepchildren with support, including food, shelter and clothing, of greater value than the $126 per month which the Welfare Board was providing them prior to its cut-off of funds—not that he was providing or was volunteering to provide ALL his income for their support. Second, respondent's main reliance is on a hearsay notation of a comment reportedly made by the stepfather

[2] 33 F.R. 11290, 45 C.F.R. § 203.1 (Aug. 8, 1968).

before his marriage and almost two years before the "fair hearing." Whatever may have been his intention at that earlier time, there is no showing that at the time of the "fair hearing" itself the stepfather was "willing to assume as much of the responsibility [for support of his stepchildren] as he could." Indeed, the fact that he joined in legally protesting the Welfare Board's cut-off of funds conclusively shows that he was not and is not willing to assume the entire burden of the stepchildren's support.

II

FEDERAL LAW NOW REQUIRES THAT A STATE PRESENT "PROOF OF ACTUAL CONTRIBUTIONS," RATHER THAN MERELY PROOF OF TOTAL NET INCOME OF A STEPFATHER, BEFORE CUTTING OFF WELFARE AID

Under New Jersey law this stepfather has no legal obligation to support his stepchildren. As respondent concedes on page 9 of its brief: "It is the law of New Jersey that such a stepparent is not liable [to provide support] for his stepchildren." Under federal law, therefore, the Welfare Board does have a legal obligation to provide aid for these children. HEW Regulation 203.1(b) (33 F.R. 11290, 45 C.F.R. § 203.1(b), Aug. 8, 1968) provides that "The inclusion in the family . . . of a 'substitute parent' [including a stepparent who is not "legally obligated to support the child under State law"– § 203.1(a)] is not an acceptable basis . . . for assuming the availability of income . . .". The same regulation further requires that "proof of actual contributions" by a "substitute parent" must be presented before welfare aid can be cut off. The record shows that the only proof presented at the "fair hearing" in this case was of the stepfather's *total* net income and that there was *no* proof of "actual contributions." (Petition, p. 15.) This case was *sub judice* at the time of adoption of this HEW regulation, and hence the regulation should be applied herein, to require the Welfare Board to meet its legal obligation to provide aid for these children. *Thorpe v. Housing Authority of the*

City of Durham, ___ U.S. ___, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969).

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition itself, the petition for a writ of certiorari herein should be granted.

Respectfully submitted,

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April 24, 1969

APPENDIX

Section 203.1, Regulations Relating to Public Welfare, Department of Health, Education and Welfare, 33 F.R. 11290, 45 C.F.R. § 203.1 (Aug. 8, 1968), provides:

(a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act, to be approved under section 402 of such Act (42 U.S.C. 602), must provide that the determination whether a child had been deprived of parental support or care by reason of the death, continual absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. As provided in Interim Policy Statement No. 4 (33 F.R. 10230, July 17, 1968), items 3.C.2 (i) and (iii), and 6(ii), in the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.

(c) Any State whose past policies and procedures with respect to the determination referred to in paragraph (a) of this section have been inconsistent with the provisions in paragraph (a) or (b) of this section must provide effective methods for giving notice of its present policies and procedures to former and potential applicants for and recipients of AFDC and to other interested persons. The methods which the State agency proposes to meet this notice requirement must be submitted to and be approved by the Regional Commissioner, SRS, DHEW. In addition, where the records of the State agency permit identification of persons whose cases have been terminated or applications denied at any time within the past 2 years by reason of such inconsistent policies or procedures, the State agency must give prompt written notification to such persons concerning the change in such policies or procedures. Such notification must be given within 90 days of publication of the regulations in this part and must explain clearly the rights which such persons have under the regulations in this part.